UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 703

Case No. 764: LARSEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mayer Gabay;

Whereas, on 3 September 1992, Cheryl Beth Larsen, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 October 1993;

Whereas, on 29 October 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"(b) ...

(i) [To rescind] the decision by OHRM in September 1990 not to recognize my home country as Australia and not to grant international entitlements in accordance with my designated home country.

(ii) [To rescind] the decisions taken by OHRM on 3 and 29 April 1991 not to reinstate Australia as my home.

(c) ...

(d) [To order] compensation for any home leave visit denied as a result of the above-mentioned decisions.

(e) ...

(i) Recognition of my home country as Australia without a break in continuity from 30 May 1986.

(ii) Determination of all international entitlements in accordance with my home country and continuous with my service within the United Nations system (i.e. from 30 May 1986)."

Whereas the Respondent filed his answer on 24 November 1993;

Whereas the Applicant filed written observations on 30 March 1994;

Whereas, on 7 July 1995, the Tribunal put a question to the Applicant and on 12 July 1995, she provided her answer thereon;

Whereas, on 14 July 1995, the Respondent submitted an additional document and on 17 and 24 July 1995, the Applicant commented thereon;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, entered the service of the International Atomic Energy Agency (IAEA) on 30 May 1986. By interagency transfer, on 1 September 1990, the Applicant joined the Department for Technical Cooperation for Development (DTCD) on a two-year fixed-term appointment.

In a telex dated 24 May 1990, the Director, Division of Personnel, IAEA, conveyed to the Office of Human Resources Management (OHRM) at Headquarters the Applicant's concern that her entitlement to home leave in Australia be recognized. In a further telex dated 6 June 1990, he explained:

"[The Applicant] was originally granted home leave to Australia for the following reasons:

1. For 11 years prior to joining IAEA she had resided in Australia.

2. All her professional working experience and professional ties were in Australia.

3. Conditions of her Australian residential permit require her to return to Australia once every 3 years.

4. The father of her young daughter and family reside in Australia.

For the above reasons IAEA recommends that her home leave to Australia status be recognized by the UN."

In a reply dated 19 June 1990, the OHRM at Headquarters informed the Director, Division of Personnel, IAEA, that "it has been concluded that [the Applicant] as USA national serving in her home country will not be entitled to any international entitlements, including home leave."

On 21 February 1991, the Applicant wrote to the Officer-in-Charge, OHRM. After citing the exceptions to the general principles of home leave contained in the Report on the Committee of Experts on Salary, Allowances and Leave Systems (the Fleming Committee Report), she requested that the exceptions set forth in the Fleming Committee Report be applied to her case and asked "that the designation of Australia as my home be reinstated."

In a reply dated 29 April 1991, the Applicant was informed that under staff regulation 5.3 and rule 105.3(b), she had met the conditions of eligibility for home leave while serving in Austria, a country of which she was not a national. However, "once she had moved to the country of which she was a national, she was no longer an expatriate and she no longer met the basic condition of eligibility for international benefits, including home leave ..."

In a memorandum dated 24 June 1991, the Applicant requested the Secretary-General to review this administrative decision. On 8 October 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 16 July 1992. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

The Panel [noted that] ... the first aim of home leave was to serve the interests of the United Nations by conserving within the Secretariat the different cultures of the home countries of the staff members while the second aim was to afford the staff members concerned and their families a measure of compensation for the disadvantages of expatriation by giving them the opportunity to renew professional and personal contacts in their home countries. The Panel agreed that allowing the Appellant to take home leave in Australia would further the first of these aims. At the same time, the Panel could not consider as unreasonable the Appellant's contention that, in her circumstances, the disadvantages of expatriation would be alleviated if she were allowed to take home leave in Australia. The Panel noted that it was apparently on that basis that the IAEA had recognized Australia as her home country for home leave purposes. Respondent has stated that, in so doing, IAEA had applied provisions in its Staff Rules similar to those contained in United Nations staff rule 105.3 (b)(ii)a. That rule provides that the Secretary-General may, in exceptional and compelling circumstances, authorize that a country other than that of the staff member's nationality be considered as his or her home country for purposes of home leave. However, the Respondent propounds that this rule cannot be applied in the case of the eligibility for home leave to any staff member unless he or she is stationed in a country other than that of his or her nationality. The Panel did not believe it could contest this proposition.

31. The only issue remaining before the Panel was therefore whether, as the Appellant contends, staff rule 105.3(b)(i)a. does not reflect the decision of the General Assembly in adopting the language now included in staff regulation 5.3 and that therefore that particular staff rule as applied in her case, deprives her of a benefit which she would have normally received under that regulation. The Panel was unable to credit this contention. The Panel recalled that, when the General Assembly adopted the permanent Staff Regulations in 1952, it stipulated that the Secretary-General should provide Staff Rules consistent with the broad principles of personnel policy which the Staff Regulations represented. The Panel could not agree that the broad principle enunciated in staff regulation 5.3 was violated by the denial of home leave to a staff member who was stationed in the country of her nationality.

Conclusions and recommendations

32. In view of the above, the Panel concluded that the Appellant's terms of employment had not been violated by the decision not to recognize Australia as her home country for home leave purposes.

33. The Panel therefore makes no recommendation in favour of the appeal."

In a memorandum dated 3 August 1992, the Assistant Secretary-General, OHRM, transmitted a copy of the JAB report to the Applicant and informed her, inter alia:

> "The Secretary-General has re-examined your case in the light of the Board's report. He concurs with the Board's conclusion that your terms of employment had not been violated by the decision not to recognize Australia as your home country for home leave purposes. ..."

On 29 October 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Staff rule 105.3(b), which limits eligibility for home leave to expatriates, does not accurately reflect and is not consistent with the intention of staff regulation 5.3 and its legislative foundation, as set forth in the Fleming Committee Report.

2. The Applicant's personal and professional ties are in Australia, which should therefore be considered her home country.

3. The Applicant's designated home country was part of her official record of transfer from IAEA and could not be altered by the United Nations pursuant to the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff Among the Organizations Applying the United Nations Common System of Salaries and Allowances.

Whereas the Respondent's principal contentions are:

1. The Applicant's receipt of home leave benefits from IAEA while serving away from her country of nationality does not create a right to home leave while serving the UN in her country of nationality.

2. No established practice exists which makes home leave available to staff serving in the country of nationality. Staff are bound by explicit provisions of the Staff Regulations and Rules, and staff rule 103.5(b) is consistent with the Staff Regulations.

The Tribunal, having deliberated from 5 to 27 July 1995, now pronounces the following judgement:

I. The Applicant, a national of the United States of America, left that country at the age of 22 and settled, first in the United Kingdom and then in Australia, where she lived for ten years. During that period she obtained permanent residency status in Australia and held a permanent position in the Australian civil service. In her submission to the JAB, she also claimed that she "had an established home and property in Australia" as well as "[her] professional contacts and network, many personal friends and family".

II. In April 1986, the Applicant was recruited to serve with the International Atomic Energy Agency (IAEA) and moved to Vienna, Austria. Her status was that of an internationally recruited staff member and, she was, therefore, entitled to home leave. She declared Australia as her home country and IAEA granted her home leave to that country. In September 1990, she was transferred from IAEA to the United Nations Headquarters in New York. Prior to her transfer, she raised the question of her future entitlement to home

leave. IAEA conveyed the Applicant's concern to the United Nations on 24 May 1990. On 19 June, United Nations Headquarters replied that the Applicant would not "be entitled to any international entitlement including home leave".

III. The Applicant, nevertheless, accepted her transfer and signed her letter of appointment on 27 September 1990. On 21 February 1991, the Applicant wrote to the Office of Human Resources Management, requesting that the designation of Australia as her home leave country be reinstated. Her request was rejected. She subsequently contested this decision before the Joint appeals Board (JAB) which upheld the Respondent's decision.

IV. The Tribunal considered the issue of time-limits raised by the Respondent before the JAB. The Respondent claimed that "the Appellant had raised the issue of her entitlement during the course of negotiation for her transfer, and was informed in June 1990 that as a United States national serving in her home country she would not be entitled to home leave". Almost ten months later, "and eight months beyond the mandatory time-limit", the Appellant sought to have this decision reviewed. The JAB waived the time limits and considered the case on its merits. The Respondent did not object. The Tribunal therefore decided to consider the case on its merits.

V. Having examined the Applicant's claims, the Tribunal finds that:

(a) Staff rule 105.3(b)(i) clearly excludes from the home leave benefit staff members who reside in the country of which they are nationals;

(b) The Applicant, a US national, clearly falls under the provisions of staff rule 105.3(b)(i);

(c) The provisions of staff rule 105.3(b)(i) in no way contradict staff regulation 5.3.

VI. The Applicant argues that the expression "home country" in staff regulation 5.3 is not equivalent to the expression "country of nationality" in staff rule 105.3(b)(i). The Tribunal does not agree. In the Tribunal's view, the Respondent's interpretation which equates the quoted expressions is entirely reasonable, and well within the Administration's competence. Furthermore, it is consistent with General Assembly resolution 470-V, paragraph 4.

VII. The Applicant's reliance on the Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the UN common system of salaries and allowances is misplaced. It does not constitute a basis for claiming rights against the receiving organization. Indeed, paragraph 1(b) of the Agreement clearly states that it "does not give the staff member rights which are enforceable against an organization".

VIII. Similarly, the Applicant's contentions with respect to the possibility of the Secretary-General authorizing a change in the place of home leave as envisaged in staff rule 105.3(d)(iii) are also lacking in merit. That staff rule applies only to staff members entitled to home leave, not to those who are not entitled to it.

IX. The Tribunal finds that the Applicant was duly informed by the United Nations before her transfer that she would not be entitled to home leave after moving to the United States of America. The United Nations was in no way responsible if the Applicant was, as she alleges, informed by officials of IAEA that her home leave entitlement would not be affected by her transfer.

X. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mayer GABAY
Member

Geneva, 28 July 1995

B. Maria VICIEN-MILBURN
Executive Secretary